Supreme Court, U.S.
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No. ___

IN THE

Supreme Court of the United States

ANGELA RUBBO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Whether the Appeals Court erred in dismissing petitioner's appeal upon her waiver in light of *United States v. Booker*, 543 U.S. __, 125 S.Ct. 738 (2005).

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OPINION BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit in this matter is an unpublished opinion under the following caption: *United States v. Rubbo*, 396 F.3d 1330 (11 Cir. 2005), and is contained in the appendix as A.1. The decision was issued 21 January 2005. Rehearing was denied on 10 March 2005 [A.2].

JURISDICTIONAL STATEMENT

The judgment of the United States Court of Appeals for the Eleventh Circuit, was rendered on 21 January 2005 with the Rehearing being denied on 10 March 2005. This Petition is within 90 days thereof [Supreme Court Rule 13]. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOKED

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the rights to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in favor, and to have the Assistance of Counsel for his defence.

STATEMENT OF THE CASE

Angela Rubbo was charged by a sixty three count Indictment returned by a Grand Jury sitting in the Southern District of Florida and charged with mail fraud, wire fraud, money laundering and various conspiracies.

Ms. Rubbo, through counsel, was able to negotiate down to one count for a plea, to wit: Conspiracy to commit wire and mail fraud, charged under 18 U.S.C. §371.

As the Appellate decision [hereinafter sometimes for brevity *Rubbo, supra*] notes:

> In return for the government agreeing to dismiss the remaining sixty two counts against her and for other favors at sentencing, Rubbo agreed to plead guilty, cooperate and waive her right to appeal any sentence she received subject to a few exceptions.

After sentencing, Petitioner through counsel filed a Notice of Appeal, and thereafter through present counsel filed a Brief, "contending that the impositions of the enhancements were erroneous applications of the guidelines" [*Rubbo, supra*].

The Government then filed a Motion to Dismiss the Appeal predicated upon the waiver, and, as the Appellate Court observed:

> Rubbo filed a reply to the government's dismissal motion in which she indicated that in light of the intervening decision in *Blakely v. Washington*, 542 U.S. __, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004) she wanted to raise the issue of whether the judge imposed enhancements she had attached in her initial brief, which coincidentally had been filed on the very date that *Blakely* was released, were unconstitutionally imposed in violation of the Sixth Amendment. Rubbo argued [and this is the crux of the instant Petition] that issue was outside the scope of the appeal waiver because, if she were right on the merits of it, the sentence imposed on her exceeded the 'statutory maximums' as defined in *Blakely* and her waiver explicitly excepted sentences in excess of the statutory maximums.

The Appellate Court then set out the waiver highlighting the exception, "unless the sentence exceeds the maximum permitted by statute", and found that "Rubbo's position is not outlandish. The plea agreement language permitting her to escape the waiver if 'the sentence exceeds the maximum

permitted by statute' is semantically similar to the 'statutory maximum' term that was a key component of the Supreme Court's reasoning and analysis in *Blakely*". As the Court also observed two days before oral argument in the instant case this Court decided *United States v. Booker*, 543 U.S. __, 125 S.Ct. 738, 160 L.Ed.2d 21 (2005).

The Court then engaged in some legal "wrestling" to explain its ultimate decision.

The Court interpreted the intent of the parties and the contract [plea agreement] and held that under the terms of the agreement statutory maximum meant the five year statutory maximum per 18 U.S.C. §371, cited to the recent decision of the D.C. Circuit in *United States v. West*, 392 F.3d 450 (D.C. Cir. 2004), and concluded:

> In summary, the right to appeal a sentence based on *Apprendi/Booker* grounds can be waived in a plea agreement. Broad waiver language covers those grounds of appeal. Absent some indication that the parties intended otherwise, when an exception to an appeal waiver is stated in terms of a sentence imposed in excess of the statutory maximum, those terms should be given their ordinary and natural meaning. Ordinarily and naturally, "statutory maximum" and "the maximum permitted by statute" refer to the longest sentence that the statute which punishes a crime permits a court to impose, regardless of whether the actual sentence must be shortened in a particular case because of the principles involved in the *Apprendi/Booker* line of decisions.

REASONS FOR GRANTING THE WRIT

I. THE APPEALS COURT ERRED IN DISMISSING THE PETITIONER'S APPEAL UPON HER WAIVER, WHICH IS CONTRARY TO THE HOLDING IN *UNITED STATES V. BOOKER*

The Petitioner has set out above the necessary elements for the Court to review this matter. Petitioner submits, most respectfully, to the Eleventh Circuit, that when that Court suggests that this Court statutory maximum definition in *Apprendi*, *Blakely* and *Booker* are specialized, "which is to say a non-natural sense . . . not only for semantic convenience but also to justify and explain the holdings the Court entered in those decisions", it is seeking to find a way to avoid deciding the way those decisions say it must.

As she did in her Petition for Rehearing, the Petitioner would suggest the Court consider the decision of the Fourth Circuit in *United States v. Hughes*, 396 F.3d 374 (4 Cir. 2005), as to the plain error aspects of what occurred below.

The Petitioner submits that the definition of this Court as to what statutory maximum means in a sentencing scheme ought to apply to the plea agreement at issue herein, particularly in light of the objected to factual enhancement found by the Judge.

CONCLUSION

For all of the foregoing, a writ of certiorari ought issue to the United States Court of Appeals for the Eleventh Circuit to review the decision at issue and enter whatever other orders are appropriate.

Respectfully submitted,

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